No. 21,888

In the

# United States Court of Appeals

## For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
*Petitioner*

and

CASCADE EMPLOYERS ASSOCIATION, INC.,
*Intervenor*

v.

SALEM BUILDING TRADES COUNCIL, AFL-CIO,
*Respondent*

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ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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# RESPONDENT'S BRIEF

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## JURISDICTION

This matter is before the Court on the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act as amended 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151 et. seq.) for enforcement of an order issued against the Salem Building Trades Council on February 20, 1967, found at 163 NLRB No. 9. The alleged unfair labor practices occurred in Salem, Oregon, in this judicial district.

## STATEMENT OF THE CASE

### I. THE BOARD'S FINDINGS OF FACT

The facts are undisputed and were stipulated to by both parties. The Salem Building Trades Council, AFL-CIO, has had a labor dispute with Reimann Construction Company, general contractor, since January of 1963, over the substandard wages and working conditions of laborers employed by that concern (R. 24). The wages and other benefits paid by Reimann are substantially below the prevailing rates in the area. For example, the differential between wage rates paid by Reimann for carpenters and those provided for under the union contracts in the Salem area ranges from 58 cents to $1.08 per hour. In addition, Reimann pays $2.00 per month for health and welfare coverage, while employers of carpenters working under union agreements pay 15 cents per hour to a jointly administered health and

welfare fund. Reimann maintains no pension plan, while employers under union contracts covering carpenters pay 15 cents per hour to a jointly administered pension trust. Reimann's hourly rate for laborers ranges from 85 cents to $1.60 per hour lower than the rate paid under union contracts in the area (R. 26-27).

Reimann was awarded a contract in early 1965 to construct a new motel, the Hyatt Lodge, near Salem, Oregon. Northridge Industries, Inc., owned this new motel (R. 24). Reimann, using nonunion carpenters and laborers, completed the new motel and left the premises on October 11, 1965 (R. 25). Prior to this time no picketing took place. Between November 8 and December 20, 1965, pickets from the Salem Building Trades Council patrolled outside the premises of the new Hyatt Lodge (R. 25).

In June of 1965, Reimann was engaged by Candelaria Investment Co., an Oregon corporation, to build a new shopping center in Salem, Oregon, to be called the Candelaria Shopping Center (R. 25). Here, too, Reimann completed the contract with nonunion carpenters and laborers. This project was completed on October 14, 1965, and Farrell's Ice Cream Parlor opened for business in the premises on November 9, 1965 (R. 25). Between November 9 and November 15, 1965, pickets from the Salem Building Trades Council sporadically patrolled near Farrell's premises (R. 26).

In both instances, the picketing took place only after Reimann had permanently vacated the premises. The picket placards contained the legend, "This building built under sub-standard wages and conditions by Reimann Construction Company Salem Building Trades Council" (R. 25). Pick-ups and deliveries did not diminish during the picketing, and the employees of both Hyatt and Farrell's continued working during this period (R. 27, 40).

As a result of the picketing, the Cascade Employers Association, Inc., a group both Hyatt Lodge and Reimann belonged to, filed the instant unfair labor practice charges and a complaint was issued by the General Counsel on December 17, 1965 (R. 9-13).

## II. THE BOARD'S CONCLUSIONS AND ORDER

The parties entered into a stipulation of facts before the Board and waived proceedings before a Trial Examiner. On February 20, 1967, the Board issued its conclusions and order (163 NLRB No. 9). That portion of the complaint based on Section 8(b)(4)(i)(B) of the Act was dismissed on the grounds that there was no evidence that the Respondent's conduct was calculated to invite neutral employees to make common cause by engaging in work stoppages. The Board did find, however, that the Respondent's picketing violated Section 8(b)(4)(ii)(B) of the Act, concluding that the picket-

ing was engaged in to force Farrell's and Hyatt to cease doing business with Reimann. The Respondent's had made the following contentions before the Board:

(1) The lack of an existing business relationship between Reimann and Farrell's and Hyatt precluded a violation;

(2) The picketing was protected under the doctrine enunciated in the case of *N.L.R.B. v. Fruit & Vegetable Packers Local 760 (Tree Fruits)*, 377 US 58;

(3) Because the picketing was "informational," it was privileged by the U. S. Constitution.

(4) The picketing was privileged by the publicity proviso to Section 8(b)(4).

In its opinion, the Board ordered the Respondent to cease and desist from threatenting, coercing or restraining the named employers or any other persons in a manner prohibited by Section 8(b)(4)(ii)(B), and required the Respondent to post appropriate notices and provide signed copies of the notice to the employers for posting on their premises.

## ARGUMENT

**A. The Board erred in finding that the Respondent forced or required the secondary employers to "cease doing business" with Reimann because no business relationship**

**existed between those parties at the time this picketing transpired.**

All parties agree, as is set out above, that at the time the picketing in question here took place no business relationship existed between the secondary employers and Reimann. The Board's decision correctly states that fact:

> "From the stipulation it is clear that at the time respondent picketed the motel and the ice cream parlor, Reimann had completed its construction contracts with Northridge and Candelaria and that no business relationship existed between Reimann and Farrell's. There is no indication that the motel, as such, or the ice cream parlor has ever engaged in business with Reimann in the past or intends to do business with Reimann in the future, nor was evidence presented to establish that Northridge or Candelaria had any specific future plans of like nature." (R. 35-36)

The Respondent's contention on this point is simply that the use of the present tense in Section 8(b)(4)(ii)(B), making it an unfair labor practice for a union to force or require any person "to cease doing business with another," restricts its application to those situations where a business relationship exists at the time of the union's conduct. In short, if no business relationship exists, there is *nothing to cease*, and that section cannot come into play.

Despite the facts and the clear wording of the statute, the Board's opinion went on to find a violation of Section 8(b)(4)(ii)(B) by concluding (1) that Congress, being concerned about neutrals, must have intended that the statute be interpreted to encompass the picketing which took place here, and (2) that Northridge and Candelaria might expand at some time in the future and want to use Reimann's services, and thus a business relationship did indeed exist. Neither of those conclusions should be allowed to stand.

Regarding the first point, the Board reached its broad result by stating that "Congress did not intend to confine Section 8(b)(4) to a strict and precise definition of terms which would limit its application in protecting neutral employers." (R. 36) The Board also stated that because the section was designed to protect neutrals, it was to be broadly construed and not confined to a "strict and precise definition of terms" (R. 36). This totally new approach to the interpretation of statutes restricting the right to strike and picket flies in the face of the existing case law. In the *Tree Fruits* opinion itself, the Supreme Court made it quite clear that such statutes are to be cautiously and strictly construed:

> "Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used

as a means to achieve specific ends which experience has shown are undesirable. 'In the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established flow from such picketing.' Labor Board v. Drivers Local Union, 362 US 274, 284. We have recognized this congressional practice and have not ascribed to Congress a purpose to outlaw peaceful picketing unless 'there is the clearest indication in the legislative history,' ibid., that Congress intended to do so as regards the particular ends of the picketing under review. Both the congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guaranties of the First Amendment." (377 US at 62-63)

Two sections of the Act, as amended in 1947, must not be lost sight of. Section 7 guarantees labor the right to engage in concerted activities, including strikes and picketing, for the purpose of mutual aid or protection. 61 Stat. 140 (1947), 29 USC §157. Section 13 permits limitations on that right only as specifically provided for in the Act. 61 Stat. 151 (1947), 29 USC § 163. Although the section refers only to the "right to strike," it has been applied to other activity, including picketing, within the scope of Section 7. See *N.L.R.B. v. Drivers Union*, 362 US 274, 281, n.9. (1960); cf. *International Union, U.A.W. v. Wisconsin Employment Relation Board*, 336 US 245, 259-60 (1949). In *N.L.R.B. v. Drivers Union (Curtis)*, 362 US 274 (1960), which dealt with the right of a minority union to picket for recogni-

tion, the Supreme Court, through Justice Brennan, made it quite clear that Section 13 commands the courts to resolve doubts and ambiguities in this area in favor of union rights prior to the passage of the Taft-Hartley Act:

> "[S]ince the Board's order in this case against peaceful picketing would obviously 'impede' the right to strike, it can only be sustained if such power is 'specifically provided for' in Section 8(b)(1)(A), as added by the Taft-Hartley Act. To be sure, Section 13 does not require that the authority for the Board action be spelled out in so many words. Rather . . . Section 13 declares a rule of construction which cautions agains an expansive reading of that section which would adversely affect the right to strike, unless the congressional purpose to give it that meaning persuasively appears either from the structure or history of the statute. Therefore, Section 13 is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation of Section 8(b)(1)(A) which safeguards the right to strike as understood prior to the passage of the Taft-Hartley Act." (362 US at 282)

These cases show quite conclusively that the Board's view, to the effect that this statute must be construed as expansively as possible, is in error.

The 1959 amendments to the National Labor Relations Act were the result of one of the most prolonged, and careful, Congressional debates in the history of our Republic. Cox, "The Landrum-Griffin Amendments to the National Labor Relations Act," 44 Minn. L. Rev. 257

(1959). Despite all the study which resulted in the particular language chosen, the Board here is saying, in effect, that the Congress, by choosing to use the present tense in drafting the language "cease doing business with," really did not mean what it was saying, but also meant the past and future tense, because it could not possibly have wanted the picketing in question here to go unchallenged. To say the least, such an attitude is outrageous. First, it would have been a rather simple matter to draft the language in question so as to read as the Board would like to have it interpreted, and it can be presumed that if the Congress had so intended, it would have done so.

Secondly, it is presumed that the legislature, in phrasing a statute, knows the ordinary rules of grammar, and that the grammatical reading of a statute gives its correct sense. *United States v. Goldenberg*, 168 US 95 (1897); *Lake County v. Rollins*, 130 US 662 (1889).

Since 1959, in construing the particular language in question here, the courts have uniformly held that the statute requires an existing business relationship. In *N.L.R.B. v. Milk Wagon Drivers Union, Local 753*, 335 F2d 326, (7th Cir. 1964), the court referred, at page 328, to an "*existing business relationship.*" In *Hoffman v. Joint Council of Teamsters No. 38*, 230 F Supp 684, 688 (1962), the court, in construing Section 8(e) of the Act, referred to firms *presently doing busi-*

*ness.*" (Italics ours) In *Local 3, International Brotherhood of Electrical Workers*, 140 NLRB 729, 730, the Board stated:

> "The objective of causing such a disruption of *an existing business relationship*, even though something less than a total cancellation of the business connection, is a 'cease doing business' object within the meaning of Section 8(b)(4)(B) of the Act." (Italics ours)

The result has been exactly the same where the courts have interpreted the language "doing business," which appears in many other statutes, such as the long-arm statutes. In the case of *Pergl v. U.S. Axel Co.*, 50 NE 2d 115, 117, the court stated "There must be continuous dealing." In *Frene v. Louisville Cement Co.*, 134 F2d 511, 515 (D.C. Cir. 1943), the court stated, that the fundamental principle underlying the "doing business" concept "is the maintenance . . . of a regular continuous course of business activities." In *Sullivan v. Sullivan Timber Co.*, 15 So 941, 943, the court stated that the phrase "does business" is equivalent in meaning to, and expressive of the same thought as, the words "doing business," and refers exclusively to the present time, not authorizing a suit against a corporation because it has in some time past transacted business in the county where the suit is brought, if it has ceased to do so at the time of bringing the action. In *Freese v. St.*

*Paul Mercury Indemnity Co.*, 252 SW2d 653, 656, the court stated that the phrase "operation of a business" or "doing business" denotes a continuing enterprise, and an occasional, incidental, isolated or sporadic transaction would not bring one within the meaning of such an expression. In *Marchant v. National Reserve Co. of America*, 103 Utah 530, 137 P2d 331, the court stated that to be "doing business" within a state, a corporation must be engaged in a continuing course of business. In *Toothill v. Raymond Laboratories*, 100 F Supp 350, 352, 353 (D.C.E.D.N.Y. 1951), the court stated that to constitute "doing business" within the state a corporation's activities must be substantial, continuous, and regular, as distinguished from casual, single or isolated acts.

It should also be pointed out that despite the Congress's obvious concern in protecting a secondary "victim's neutrality," (to use the Board's unfortunate terminology), the National Labor Relations Act has often been interpreted in a way that indirectly results in harm to the neutral secondary employers.

In *N.L.R.B. v. Servette, Inc.*, 377 US 46 (1964) the court unanimously interpreted the term "produced" to encompass a situation where the neutral secondary employer merely "distributed," despite the fact that the result indirectly resulted in harm to that secondary employer, who was in fact a "neutral." In *Tree Fruits*,

itself, the court interpreted language in the same statute with the same result.

The utter illogic of the Board's simplistic analysis of the situation in question here (that because the secondary employers were neutrals, they *have* to be protected) is clearly pointed out by the following excerpt:

> "Almost every strike causes economic loss to one or more employers who are unconcerned with the labor dispute. A coal distributor may go bankrupt because of a coal strike. A small steel fabricator may be forced to close his doors because of a major steel strike. Such economic losses as these far outweigh the losses caused by secondary boycotts. Yet Congress has not sought to aid these neutrals * * * This point is significant—and sometimes overlooked—because it shows that, while harm to a neutral is an essential ingredient of a secondary boycott, such injury is not by itself objectionable in the eyes of the legislature." (Tower, "A Perspective on Secondary Boycotts," 2 Lab. L. J. 272, 273 (1951))

The Board's second point, that Respondent forced the secondary employers to "cease doing business" with Reimann because at some time in the future they might want to deal with him, also cannot withstand close scrutiny.

The Board stated in its opinion that there was no evidence that the motel or ice cream parlor had dealt with Reimann in the past, or intended to in the future, or that Northridge or Candelaria had any such future

plans. Then the Board went on, despite these facts, to hold that there was indeed some sort of a business relationship because "* * * Reimann remained within that class of employers to whom future contracts might be awarded." (R. 37) This conclusion is nothing but gross and unfounded speculation. There is not the slightest inference in the record that either concern had plans to expand in this "general area" or that Reimann would even be interested in bidding on such a project. By so concluding the Board assumed a fact, crucial we believe, which was not in evidence, which Respondent was not given the opportunity to rebut. Such an assumption is not only *per se* erroneous, but extremely unfair. Even the more liberal rule regarding judicial notice, that a matter will be noticed so long as it can be verified with a certainty,[1] could not have been met here.

It is clear here that the Board was interested only in supporting a previously arrived at conclusion through the use of this wild speculation. Otherwise, it would have taken into account the possibility that Reimann at some time in the future would discontinue its sub-standard wages and become unionized. In that case, of course, nothing would prevent that concern from being awarded such contracts *if indeed* they were to be offered, and if he happened to be the low bidder. Of course, there is nothing in the record about the future possibility of Reimann becoming unionized, but

1. McCormick on Evidence, Section 331.

this speculation would be no more unfounded than that in which the Board actually engaged.

The past decisions of the Board militate against the unsupported speculation engaged in here. In *International Association of Heat & Frost Insulators*, etc., 139 NLRB 688, 691, the Board stated:

> "* * * we cannot find that Industrial was using, handling, or otherwise dealing in products of Speed-line or that it ceased doing business with Speed-line, *as any such transactions were merely possibilities and highly speculative. Accordingly, we shall dismiss the charges relating to Speed-line Manufacturing Company.*" (Emphasis added)

**B. The Board erred in refusing to hold that the principle enunciated in N.L.R.B. v. Fruit & Vegetable Packers and Warehousemen (Tree Fruits) 377 US 58 (1964) precluded the picketing in question from constituting a violation of §8(b)(4) of the Labor Management Relations Act.**

In *N.L.R.B. v. Fruit and Vegetable Packers and Warehousemen* (Tree Fruits) 377 US 58 (1964), the Supreme Court held that the union involved did not violate Section 8 (b) (4) of the National Labor Relations Act by peacefully picketing, at secondary sites, against the products of a primary employer with whom the union had a dispute, stating flatly that

> "The consumer picketing carried on in this case is not attended by the abuses at which the statute was directed." (377 US at 64)

That decision clearly immunizes the picketing in question here from constituting a violation of Section 8(b)(4).

In *Tree Fruits*, as here, the union had a dispute with the producer and, as here, followed the products of that concern to secondary sites at the consumer level. In *Tree Fruits*, as here, there was no cessation of pick-up or deliveries at the secondary sites, and no refusal on the part of the secondary employees to cross the picket lines. The sole distinction between *Tree Fruits* and the situation in question here is that in the former case the union directed the consumers not to purchase the specific product it was picketing against, whereas, here, the Respondent did not direct the public to do, or to refrain from doing, *anything*, but merely publicized the fact that the buildings in question were built under substandard conditions.

In *Tree Fruits*, the union picketed 46 Safeway Stores in the Seattle area in order to substantially reduce the sale of one specific product, Washington state apples, which were being packed by nonunion firms. The Supreme Court, in holding such conduct not a Section 8 (b) (4) violation, made it quite clear that the result would have been to the contrary had the union directed the consuming public to withhold all patronage of the secondary employer:

> "When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. * * * On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than follow the struck product; it creates a separate dispute with the secondary employer." (377 US at 72)

Here, the Board has seized upon the above excerpt from the *Tree Fruits* decision, and stated that the picketing involved in this situation was "employed to persuade customers not to trade at all with the secondary employers" (R. 39). Such a conclusion is patently absurd. The picket placards used in this case displayed the following legend:

THIS
BUILDING
BUILT UNDER
SUB-STANDARD
WAGES AND CONDITIONS
BY
REIMANN CONSTRUCTION COMPANY
SALEM BUILDING TRADES COUNCIL

The placards did not, as can be plainly seen, ask, or even suggest, that the public "not trade at all" with

Farrell's Ice Cream Parlor or with Hyatt Lodge. They did not even go so far as the union in *Tree Fruits* and ask the public to refrain from purchasing a portion of the goods and services offered by those two concerns To the contrary, the above language clearly informed the public that the Respondent's dispute was with Reimann and that the only purpose of the picketing was to inform the public that the buildings were built under substandard conditions.

In addition, there is nothing in the record to indicate that the men carrying the placards informed the public *in any way* that they were not to patronize those two establishments. Moreover, the broad contention of the National Labor Relations Board that the public at large "must necessarily refrain from all dealings with the picketed retailers" is belied by the fact that *only one outlet* of both these concerns was picketed, and then only under the circumstances set out above. The Board flatly asserts that by picketing these two outlets the Salem Building Trades Council used a boycott "employed to persuade customers not to trade at all with the secondary employers." There is no basis in the record, let alone a substantial one, for such conclusion. Nowhere in the stipulated facts, which the Board accepted as the entire record in this case, is there evidence that even *one* potential customer chose not to patronize these two concerns because of the picketing. There is

no evidence that either concern was damaged in the slightest degree in this period. Surely, if either outlet had suffered a decline in business, it would have proffered its records to substantiate such a fact. This fact alone renders the Board's finding of an 8(b)(4) violation erroneous, as the *Tree Fruits* decision makes it clear that in order to find a threat, coercion or restraint, the concerns picketed must show economic loss. In that case, the Court of Appeals for the District of Columbia had held that Section 8(b)(4) was violated only if a substantial economic loss had accrued or was likely to occur (308 F2d 311). The Supreme Court, in reviewing the decision, went much further, saying that economic loss in itself would not constitute a *per se* violation of that section, but would in fact be nonviolative if attributed to consumer picketing of an unfair product:

> "We disagree therefore with the Court of Appeals that the test of 'to threaten, coerce or restrain' for the purposes of this case is whether Safeway suffered or was likely to suffer economic loss. The violation of 8(b)(4)(ii)(B) would not be established, merely because respondent's picketing was effective to reduce Safeway's sales of Washington state apples, even if this led or might lead Safeway to drop the item as a poor seller." (377 US at 72-73)

Given the fact that neither Northridge nor Candelaria has shown any economic loss, the conclusion is inescapable that *Tree Fruits* compels a reversal of the

Board's conclusion and a finding that the Salem Building Trades Council did not "threaten, coerce, or restrain" Hyatt or Candelaria.

The General Counsel's brief seems to imply that the *Tree Fruits* Doctrine should not be applied in Building Trades situations, evidently on the assumption that a building, or a portion thereof, cannot be "dropped" like one particular product line, and that as a result any picketing of a building must *ipso facto* result in a complete cessation of trade. Although such an argument might sound appealing in the abstract, it is clear that such was not the case here. As was pointed out above, there is absolutely no evidence that the picketing in question here resulted in any loss of trade. As a result, by refraining from asking the public not to patronize these two establishments, Respondent here did not confront them with the situation where they would have had to make the decision not to use the buildings. In short, we are not here presented with the question the General Counsel seems to allude to in his brief. It should be pointed out, however, that this Court has already put to rest the contention that *Tree Fruits* will not apply to the Building Industry. In the case of *NLRB v. Millmen and Cabinet Makers Union, Local No. 550*, 367 F2d 953, (9th Cir. 1963), the Union picketed at the construction site of a new housing addition, which was utilizing precut lumber prepared under substandard conditions. Al-

though this Court ordered enforcement of the Board's order,[2] the opinion made it quite clear that *Tree Fruits* could have been applied had the facts been different:

> "The principle enunciated in *Tree Fruits* permits a union to engage in picketing at the establishment of a secondary employer, so long as it is directed to his customers and not his employees, and not an attempt to 'restrain or coerce' the secondary employer to cease doing business with the primary employer." (367 F2d at 955)

The General Counsel nearly admits in his brief that if this Court were to hold that *Tree Fruits* cannot be applied in this situation, it would deprive Building Trades unions of the equal protection of the law as it presently stands. He then attempts to minimize the gross injustice of such a result through the use of *dicta* appearing in *Local No. 5, United Ass'n, etc., v. NLRB*, 321 F2d 366, 370 (D.C. Cir. 1963), cert. denied. 375 US 921. But the General Counsel fails to realize that the Court there simply meant that while the secondary boycott provisions of the L.M.R.A. apply equally to all unions, they are used to prohibit activities of building

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2. There were several facts in that case not present here. A secondary employee refused to cross the picket line, and the secondary employer was doing business at that time with the primary concerns. In addition, the union attempted to apply direct force on the secondary employer to cease doing business with the primary concern, by stating to the secondary employer's counsel, "Well, it would be quite simple to get the fixtures removed and the pickets removed. All you have to do is stop buying from Steiner Lumber." (367 F2d at 954) The distinction is important—rather than applying indirect pressures through falling consumer demands, as in *Tree Fruits*, the union in that case made a direct oral threat to the secondary employer.

crafts *more often* than other unions, because of the particular nature of those unions' work. The result in that case would, of course, have been the same regardless of the type of union involved. The General Counsel has cited no authority for the proposition that *any* right of organized labor may not be availed of by the building crafts unions simply because of the nature of their work. Indeed, the Labor Management Relations Act is founded upon the proposition that all members of the laboring class are to be accorded equal and nondiscriminatory treatment.

If, as the General Counsel suggests, the *Tree Fruits* doctrine is to be modified so as not to apply to certain unions, that decision must come from the Congress and not from the Board or the Courts:

> "Although there are possible ways of finding a middle ground to control the extent of the right to product picket, it is doubtful that any significant curb on this right would be made by the Board or courts in view of the present state of the law and the difficulties that would attach to any limitation. Whether the Supreme Court's sanction of product picketing in Tree Fruits should stand will ultimately have to be faced by the Congress." Note, "Product Picketing—a new loophole in Section 8(b)(4) of the National Labor Relations Act," 63 Mich. L. Rev. 682, 696 (1965)

One final point should be made in regard to the *Tree Fruits* decision. That opinion makes it clear that

a necessary element of a violation of Section 8(b)(4) would be a finding that the union, through picketing, was seeking "the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute." (377 US at 64). Here such finding is impossible, because no business relationship existed between Reimann and the secondary employers picketed, and thus there was no way in which the secondary employers could in fact cooperate. This detail is dealt with at length *supra*.

**C. The conduct in question here was protected by the publicity proviso to section 8(b)(4) of the Labor Management Relations Act.**

The "publicity proviso" to Section 8(b)(4) provides that nothing contained in Section 8(b)(4),

> "* * * shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not perform any services, at the establishment of the employer engaged in such distribution."

The stipulation entered into before the Board makes it clear that the Respondent had a labor dispute with Reimann. (R. 24) It is also clear from the stipulation that Reimann "produced" the motel and the building where Farrell's Ice Cream Parlor is situated, within the meaning of the statute. (R. 24-25) No contention is made that the legend on the banners was not truthful. The Record also shows that no one employed at the motel or the ice cream parlor was caused to refuse to perform any services. (R. 39-40)

Although the stipulation refers to Respondent's conduct as "picketing," we submit that the proper description of Respondent's conduct must be considered in the light of all other facts contained in the stipulation. The Board has recognized that not all patrolling constitutes "picketing" within the meaning of the publicity proviso to Section 8(b)(4).

In the case of *Chicago Typographical Union*, 151 NLRB No. 152, 59 LRRM 1001, the Board quoted with approval from the decision of the Seventh Circuit Court of Appeals in *N.L.R.B. v. United Furniture Workers of America*, 337 F2d 936, 940, as follows:

> "* * * 'One of the necessary conditions of "picketing" is a confrontation in some form between union members and employees, customers, or suppliers who are trying to enter the employer's premises.' "

In the instant case, we submit that under the stipulated facts it cannot be said that there was a "confrontation between union members and employees, customers or suppliers who are trying to enter the employer's premises."

**D. The patrolling in question here is constitutionally protected by the First Amendment's guarantee of free speech.**

It is conceded in this case that no pick-ups or deliveries were halted, or even diminished, as a result of the patrolling which took place in this case. It is also conceded that no employees of either of the "secondary" concerns were induced not to work, and that all did in fact work throughout the period in question here. Further, the language on the placards themselves makes it clear that this was only informational patrolling, engaged in in order to let the public know of the dispute the union had with Reimann. This picketing, being for the sole purpose of disseminating information, is constitutionally protected by the free speech guaranties of the First Amendment. The General Counsel's brief, at page 14, concedes that picketing, in the absence of an unlawful secondary object, would be protected.

The General Counsel argues that the picketing coerced the secondary employers and that "direct economic pressure against the picketed employers, as a tac-

tical device to assist the union in its dispute with Reimann, could also be inferred." (Brief, p. 17). But, in the absence of any evidence of economic damage, loss of customers, or loss of employees, it is clear that the Board was in error in concluding that the picketing constituted "economic pressure" or "clear coercion." Section 8(b)(4) prohibits consumer picketing *only* if there is evidence *aliunde* that the picketing was coercive.

*N.L.R.B. v. Fruit & Vegetable Packers, Local 760, (Tree Fruits)* 377 US 58 (1964);

*Wholesale Employers Local 261 v. N.L.R.B.*, 282 F2d 824, 826, 827 (D.C. Cir. 1960);

*N.L.R.B. v. Brewery Workers Local 366*, 272 F2d 817, 819 (10th Cir. 1959);

*N.L.R.B. v. General Drivers Local 968*, 225 F2d 205, 210, 211 (5th Cir. 1955), cert. denied 350 US 914.

There is no such evidence in this case. The Board, in its decision, attempts to impute sinister motives to the informational patrolling in this case by pointing to a letter written May 27, 1965, by the Oregon State Building & Construction Trades Council to Hyatt, threatening to put the motel on the "Official Unfair List and Do Not Patronize List." It must be pointed out that

there is nothing in the record which would indicate *any* agency, relationship, or direct or indirect connection, between the Salem Building Trades Council, the union involved in this case, and the Oregon State Building & Construction Trades Council. It was therefore error for the Board to rely on that letter as evidence of the "real" intent of the Salem Building Trades Council. Another point which should be made with respect to that letter is that the threat it contained, as the record indicates, was never in fact carrried out.

The General Counsel's brief, at pp. 15-16, makes much of the supposed fact that Reimann's principal place of business was not picketed and agrees that this factor was given weight by the Board in concluding that the Union obviously intended to harm the secondary employers. *Nowhere* in the stipulation, which constitutes the entire record in this case, is there any indication that Reimann's main office was not picketed. As a result, this alleged fact was erroneously relied upon. *Even if* Reimann's main office was not picketed, it should be pointed out that the Board's former rule, that secondary site picketing was lawful only if no adequate opportunity to picket the primary site were present, has been rather thoroughly discredited. See, e.g., *N.L.R.B. v. General Drivers Union*, 225 F2d 205, 210-211 (5th Cir. 1955). cert. denied 350 US 914; *Sales Drivers Union v. N.L.R.B. (Campbell Soup)*, 229 F2d 514 (D.C. Cir.

1955). Cert. denied 351 US 972; Lesnick, "The Gravamen of the Secondary Boycott," 62 Columbia L. Rev. 1363, 1378-1381 (1962).

Since there is no evidence of coercion in this case, the Board's conclusion, stripped of all rhetoric, is that the informational picketing in question here was *per se* coercive and therefore unlawful. Such a holding is clearly erroneous, as the restriction it places on informational patrolling is unconstitutional. U. S. Const., First Amendment; *Chauffers, Teamsters & Helpers Union v. Newell*, 356 US 341, Rev'g 181 Kan 898, 317 P2d 817.

Where the language of a statute will bear two equally obvious interpretations, the one which is clearly in accordance with the Constitution is to be preferred. *Knights Templars and M. Life Indem. Co. v. Jarman*, 187 US 197; *United States ex rel Attorney General v. Delaware & H. Co.*, 213 US 366, 408; *United States v. C.I.O.;* 335 US 106; *Carlson v. California*, 310 US 106. Section 8(b)(4) could as easily have been applied in this case in such a way as to allow the uncoercive informational patrolling we are here discussing.

The Board erred in concluding that the First Amendment does not protect the informational patrolling which the Respondent engaged in here.

## CONCLUSION

For the reasons stated above, we respectfully submit that the Court should enter a decree setting aside and denying enforcement of the Board's order.

GREEN, RICHARDSON, GRISWOLD & MURPHY
DONALD S. RICHARDSON,
JOHN J. HAUGH

September, 1967.

## CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18, 19 and 39 of this Court and in his opinion the tendered brief conforms to all requirements.

DONALD S. RICHARDSON
*Of Attorneys for Respondent.*

## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*) are as follows:

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: * * *

*Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor or-

ganization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

Sec. 8 (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.